

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-6187

To Be Argued By
Sarah D. Bollotin
Plaintiff-Appellant,
Pro Se

UNITED STATES COURT OF APPEALS
For the Second Circuit

SARAH D. BOLLOTIN,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellee.

On Appeal From The
United States District Court
Southern District Of New York

APPELLANT'S REPLY BRIEF

Sarah D. Bollotin, Pro Se,
Plaintiff-Appellant
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New York, N.Y. 10011

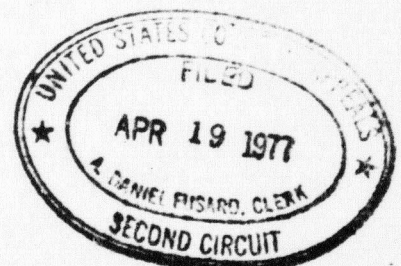


TABLE OF CASES

Continental Ill. Nat'l. Bank & Trust Co. of Chicago v.
U.S., C.A. Ill. 1974, 504 F.2d 586.

Geller v. The Dept. of the Treasury (1969) 53 N.J. 591,
252 A.2d 393.

Haines v. Kerner, 92 S. Ct. 594, 404 U.S. 519, 405 U.S. 958,
30 L.Ed.2d 819.

Nordmann v. Johnson, (1939) 123 N.J.L. 259, 8 A.2d 323.

State ex rel. Landis v. Ault, 176 So. 789, 791,
129 Fla. 686 (1937).

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This Reply Brief will clarify issues. Three (3) annuity and pension plans are involved:

1. The New Jersey mandatory Teachers' Pension & Annuity Fund (TPAF) upon which plaintiff has always been fully taxed. This is not contested.
2. The Supplemental Annuity Collective Trust (SACT) which is a voluntary plan offered teachers by the State of New Jersey to increase their retirement benefits.
3. The Variable Annuity Marketing Company (VALIC) plan which is tax-sheltered under Internal Revenue Code Section 403.

The original complaint, served and filed by plaintiff, Pro Se, alleged: (pg.2)

, "In 1968 the Newark Board of Education voted to allow its employees to participate in a tax-sheltered program. Plaintiff... was told to write to Trenton, N.J., for application for Supplemental Annuity Collective Trust Fund Pension, hereinafter referred to as SACT.

"Under N.J.A.C. rules it was necessary to file an Enrollment Application for SACT Tax Sheltered Annuity together with a Salary Reduction Agreement between plaintiff and employer... The Salary Reduction Agreement also required was never completed...

"Notwithstanding, an inept payroll clerk put the added 5% withholding into the computer and plaintiff could not stop the deduction... from her paychecks until on or about February 8, 1972... Plaintiff... tried to recover said total deduction from the New Jersey Treasurer but was told she would have to wait until retirement.

"In view of the fact that the Newark Board of Education had created a tax-sheltered program for its teachers under Sec. 408(c) of I.R.C. plaintiff tried to claim this on her Form 1040 Income Tax Return. Claim was disallowed.

"FIFTH: Under Title 26, U.S. Internal Revenue Code, Sub-chapter D-'Deferred Compensation, Sec. 404 (2) Contributions made under more than one plan,' plaintiff may make claim for tax refund."

Plaintiff's Pro Se "Reply To Answer To Amended Complaint" reads in part as follows:

"On April 12, 1971 plaintiff returned U.S. I.R.S. Tax Form 1040 for the tax period ended Dec. 31, 1970, showing over-payment of \$1,167.00 based on erroneous nonrecognition of plaintiff's right to tax shelter privilege. Under Title 26 U.S.C. #404 (2) plaintiff made contributions under more than one plan (Emphasis added) which resulted in \$ 3.00 being withheld from her paychecks in error and not credited as a tax-sheltered contribution. Accordingly, plaintiff claimed tax credit for the amount of \$1,058.00, resulting in a claim for refund on I.R.S. Tax Form 1040 in said sum of \$1,167.00. There was never any question as to refund amount of \$109.00, which was refunded to plaintiff..., representing a finding of full disallowance of plaintiff's claim to tax shelter of \$1,058.00.

"Plaintiff following ... procedure and on March 23, 1973 finally received letter signed by Acting Asst. Chief, Appellate Branch Office,

"Internal Revenue Service, N.Y.C. which states... "The Service Center will issue a notice of partial disallowance of your claim for refund." (A-18). (Emphasis added).

"Plaintiff alleges... that said letter misrepresents the disagreement. A misleading statement of facts in a material matter casts doubt on the defense in that said letter inaccurately refers to a partial disallowance when there was a full disallowance of plaintiff's claim for tax credit.

"There is an assumption that words used in revenue rulings are employed precisely."

Continental Illinois Nat'l Bank & Trust Co. of Chicago v. U.S., C.A. Ill. 1974, 504 F.2d 586.

"The term 'misleading' involved an element of deception, something which deliberately leads the mind into error..."
State ex rel. Landis v. Ault, 176 So. 789, 791,
129 Fla. 686 (1937).

"It has been held that one of the principal purposes of the Constitution is to avoid surprise, fraud or stealth in legislation resulting from the use of misleading... matter... and must not be so worded as to mislead (an ordinary mind' " (Supra, 129 Fla. 686).

"Allegations of pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers."
Haines v. Kerner, 92 S.Ct. 594, 404 U.S. 519,
30 L.Ed.2d 652, rehrg. den. 92 S.Ct. 963,
405 U.S. 948, 30 L.Ed.2d 819."

On Dec. 8, 1975 counsel argued "Plaintiff's Memorandum In Opposition To Defendant's Motion For Judgment on the Pleadings." (A-17). Plaintiff did not know of this proceeding until after counsel "won his point" which plaintiff assumes was based upon the Methods A and B upon which Opinion (A-3) is based.

The aforesaid "Memorandum of Law" included Xerox Copy of bulletin appended hereto as Exhibit A, which shows that counsel was fully informed of the third plan: The VALIC PLAN.

Plaintiff now discovers that the U.S. District Court Clerk who prepared and certified this Record On Appeal for Plaintiff Pro Se, failed to transmit the aforementioned "Memorandum In Opposition".

*References to Record On Appeal are in the Appendix, with pages numbered A1 to A63.

It should also be noted that on February 2, 1977, plaintiff discovered the Second Amended Complaint and obtained "Stipulation" to include this in the Record (A13). The original complaint and Amended Complaint prepared and filed by plaintiff pro se, are not included in the Record (Appendix), nor is Plaintiff's Pro Se Reply to Answer to Amended Complaint included.

On or after March 8, 1976 counsel prepared a Second Amended Complaint which states:

"Ninth: Plaintiff in accordance with the aforesaid statute made voluntary contribution to SACT from 1968 until on or about 1972...

"Tenth: Plaintiff intended that her said SACT contribution should be excluded from her gross income for Federal income tax purposes."

It will be noted that the Witness on Trial stated: "VAR stands for Variable Annuity Fund. That is what they called it, but it was under the N.J. Statute Supplemental Annuity Collective Trust." (Transcript A-36, lines 10,11, 12.)

The trial transcript reveals the following: (A-37, lines 3 to 17):

"Q. When your employer made these contributions to SACT, did you intend and desire that they be tax sheltered?

"A. Absolutely.

"The Court: What do you mean by that, that they would be tax sheltered?

"The Witness: That the taxes be deferred until I retired. That is what is meant.

"The Court: In other words, you pay the taxes when you collected on the annuity?

"The Witness: Yes.

"The Court: That would not be taxable the year you paid it in?

"The Witness: That was the assumption. That was the intention.

At pg. A45 line 22, the trial transcript continues thus:

"A. Yes, sir, they started this program Sept. 1968...

"Q. Miss Bollostin, I show you Defendant's Exhibit B for

"identification. Is the top sheet of Defendant's Exhibit B a letter that you wrote to Mr. Mednick of the Internal Revenue Service?

"A. Yes, sir."

Again continued at pg. A-47, line 8:

"A. Yes. I sent these papers to Mr. Mednick..."

At pg. A-53 Line 16, the following is stated:

"A. Well, it is something entirely different. It is not SACT... It actually was authorized by the members of the Board of Education for the teachers to do this in Sept. 1968, but nobody knew what they were doing. It was just awful."

At this point, plaintiff-appellant wanted to refer to the Variable Annuity Marketing Co. VALIC plan however counsel had advised her not to mention VALIC. Plaintiff knew nothing of the Methods A and B referred to in the Opinion and did not understand the total picture until after she received Appellee's Brief on April 8, 1977.

Plaintiff repeats from her opening Brief at pg. 3, last paragraph of letter to Mr. Mednick:

"I elected the VALIC tax sheltered program... Because of the ineptitude and incompetence of Board personnel,, amounts never authorized were wrongly sent to the Division of Pensions Fund [SACT] instead of the tax-sheltered VALIC program. (Emphasis added).

"Ironically, this is the only reference made to the true facts..."

The cases referred to in Appellee's Brief at pg. 9, citing Judge Bonsal's Opinion, are erroneous insofar as the instant case is concerned in that they are governed by a completely different foundation based upon United States Acts of Congress, Executive Orders and Federal legislation covering U.S. Civil Service pension and retirement plan. In contrast, plaintiff-appellant's situation is not only controlled by the Internal Revenue Code but also by N.J. Statutes and the New Jersey Administrative Code. New Jersey and Federal provisions governing their respective retirement and pension plans are vastly different, based upon totally different laws.

Plaintiff's Memorandum of Law submitted by counsel who acted for plaintiff-appellant in the U.S. District Court cited Nordmann v. Johnson, 1939, 123 N.J.L. 259, 8 A.2d 323, in which it was held

that the New Jersey Teachers' Pension Funds were established by the Legislature... In order to give teachers protection against the disabilities of old age... part of a wise public policy to foster and encourage education and to protect in old age those who have devoted their lives to so important a public cause... The Fund is a personal privilege which the State holds solely for the teacher's benefit." (Emphasis added).

Counsel wrote: "The same public policy in favor of Miss Bollotin is expressed in Geller v. The Dept. of the Treasury, 53 N.J. 591, 252 A.2d 393 (1969):

"Pensions for public employees serve a public purpose. A primary objective in establishing them is to induce able persons to enter and remain in public employment, and to render faithful and efficient service while so employed. 3 McQuillin, Municipal Corporations (2d Ed. Rev. 1963) # 12.141. They are in the nature of compensation for services previously rendered and act as an inducement to continued and faithful service. Being remedial in character, statutes creating pensions should be liberally construed and administered in favor of the persons intended to be benefited thereby. McQuillin, supra at #12.143; and see Adams v. City of Modesto, 53 Cal.2d 833, 3 Cal.Reptr. 561, 566, 350 P.2d 529 (1960); Giuliano v. Bd. of Trustees of Firemen's Pension F., 89 Ill. App.2d 126, 231 N.E.2d 257, 258 (1967); Flake v. Bennett, 150 N.W. 2d 849, 854 (Iowa Sup. Ct. 1968)."

"The Geller case is illustrative of how a New Jersey School Teacher was protected by the courts against the confusing bureaucratic maze in which she found her pension threatened."

It should be clear that although Plaintiff wanted the SACT plan in 1966, she did not wish to continue with SACT in Sept. 1968, when VALIC became available. However, Plaintiff could not control the actions of other employees who failed to implement the change-over from SACT to the tax-sheltered VALIC plan, until December of 1970.

Plaintiff made every effort to comply with the necessary bureaucratic requirements of the Internal Revenue Service, the Newark Board of Education and the State of New Jersey however plaintiff could not do anything about the mechanics of the bookkeeping which should have been employed to enable plaintiff to benefit from the tax sheltered privilege provided by law.

As stated in the Geller case at pg. 396, (op.cit.):

"It would be most unfair and inequitable to penalize me for something it failed to do."

CONCLUSION

It is respectfully requested that the complaint should be given every favorable rule or interpretation.

WHEREFORE, plaintiff-appellant prays that she be granted the full tax credit of \$1,058.00 as claimed, plus interest, penalties, damages and all costs of suit incurred.

Dated: New York, N.Y.
April 18, 1977.

Respectfully submitted,



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New York, N.Y. 10011

EX A

EQUITY INVESTMENTS AVAILABLE FOR THE EMPLOYEES
OF THE NEWARK BOARD OF EDUCATION THROUGH THE
NEW TAX-DEFERRED ANNUITY PROGRAM

You will be pleased to learn that the Newark Board of Education has approved a plan to make tax deferred annuities available to its employees under Public Law 87-370.

The Variable Annuity Life Insurance Company (VALIC) was approved as a carrier for tax-deferred variable annuities. VALIC is one of the principal carriers of tax-deferred variable annuities in the United States.

A retirement plan is in effect, a continual investment program that gradually matures and makes payment of funds accumulated. If there has been "inflation" in this principle in late years it is related to the increase in the cost of living and thus the reduced purchasing power of the dollars accumulated. The Newark Board of Education was concerned about this and, therefore, approved a plan designed to hedge against inflation by means of the variable annuity.

The cost of the plan is entirely up to you. The cost is the amount of money you desire to invest (save regularly). Invest whatever you feel you can afford. Naturally, the more you save now the more you will have available for retirement.

There are NO HEALTH QUALIFICATIONS OR HEALTH REQUIREMENTS OR HEALTH BENEFIT REQUIREMENTS in connection with this plan.

Your plan and retirement benefits will be custom-made for you by our administrator upon presentation of certain facts. Maybe you already have a sort of retirement plan but have you examined your benefits closely? Have you hedged against inflation? Chances are you will want to use the variable annuity to augment any other retirement program you have.

Now, let's take a sharper look at how your retirement plan works in detail and how it will work for you:

POINT #1 - For the investment you make during your working years, you are guaranteed an annuity in monthly payments from the beginning of your retirement for the rest of your life.

POINT #2 - The VALIC plan is a group plan which lowers your cost considerably, yet still retains the flexibility of an individual plan.

POINT #3 - Through the VALIC plan you may place 100% of your investment in the form of a variable annuity. Payments to you from a variable annuity are determined from professionally managed equity investments (Common Stocks). Through the variable annuity you may receive additional dollars but you still must be willing to accept the risk of possible downward fluctuation of investments.

POINT #4 - The plan is tax-deferred. You pay no income tax now on that part of your salary that you choose to invest. You will pay income taxes on the annuity payments in retirement but the incidence of taxation may well be lower because of possible double exemptions and a lower tax bracket.

These benefits should help to reveal the consideration and effort put forth by the Newark Board of Education so that you might have the preferential treatment which Congress has made available to members of the education profession.

Now - here is all you have to do to get your own personal program estimate. Look at the enclosed self-addressed business reply envelope. Fill in the requested information and drop it in the mail. That's it. The information that is received will be kept strictly confidential and a personalized proposal will be prepared for you so that you can see what your retirement benefits will be. An appointment secretary will be contacting you within a few days. Any additional questions you may have regarding the program can be answered during your personal interview.

This bulletin is authorized for distribution only when accompanied or preceded by an effective prospectus of
THE VARIABLE ANNUITY LIFE INSURANCE COMPANY

P. O. Box 3206
Houston, Texas 77001

COPY RECEIVED
Robert B. Fish Jr.
UNITED STATES ATTORNEY
4/19/77
Marian F. Bryant